IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82-5188

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SUPREME COURT, U.S.

McARTHUR BREEDLOVE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

I

WHETHER THE INTRODUCTION OF OUT-OF-COURT STATEMENTS OF AVAILABLE WITNESSES VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN SUCH STATEMENTS ARE ADMITTED AS NON-HEARSAY BY A STATE TRIAL COURT BUT THE PROSECUTION SUBSEQUENTLY RELIES UPON SUCH STATEMENTS AS SUBSTANTIVE EVIDENCE OF THE GUILT OF AN ACCUSED.

II

WHETHER SECTION 921.141(5)(h), FLORIDA STATUTES (1977), ESTABLISHING AS A POTENTIAL AGGRAVATING CIRCUMSTANCE IN A CAPITAL CASE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" WAS APPLIED IN AN OVERLY-BROAD MANNER BY THE FLORIDA COURTS IN THIS CASE, IN VIOLATION OF THE PRINCIPLES ESTABLISHED IN GODFREY V. GEORGIA, 446 U.S. 420 (1980).

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, McArthur Breedlove, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida in this cause, rendered on May 19, 1982.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 413 So.2d 1. The full opinion is included in the appendix to this petition at pages 1-14.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), to review the judgment and opinion of the Supreme Court of Florida, issued on March 4, 1982 and rendered upon the denial of a timely motion for rehearing on May 19, 1982. On July 6, 1982, Mr. Justice Powell issued an order extending the time for filing this petition to August 17, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMEND. VI, U.S. CONST.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

AMEND. VIII, U.S. CONST.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMEND. XIV, §1, U.S. CONST.

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§921.141, Fla.Stat (1977)

> (5) AGGRAVATING CIRCUMSTANCES. - Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (h) The capital felony was especially heinous, atrocious, or cruel.

STATEMENT OF THE CASE

Petitioner was charged by an indictment filed December 4, 1978 with first-degree murder, attempted first-degree murder, burglary, grand theft, and petit theft. Appendix (hereinafter designated by the symbol "A") at 55-58. The charges arose from a burglary on November 6, 1978, during which one person was killed and another allegedly assaulted (A. 1, 55-56). Post-arrest statements were obtained from petitioner following his apprehension on these charges, and were the only evidence of his perpetration of the offenses (A. 5-6, 59-66, 313-15).[1]

At the time that petitioner was interrogated, the police

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[1] The medical examiner who performed the autopsy on the homicide victim testified that he had died as the result of a single stab wound to his chest, and that he was unable to determine whether the victim had been lying in bed or moving at the time that the wound was inflicted (A. 72-79). Petitioner, in his post-arrest statement, admitted having burglarized the residence, and stated that he had taken a knife into the bedroom to open a jewelry box when the following transpired:

> A. Well, I started going through a box -- a jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed me by the shirt, and I swung back with the knife, and I ran.
>
> * * *
>
> A. I jumped, panicked. He just grabbed my shirt. I swung back with the knife, like that, and then he turned loose of my shirt and I ran. (A. 63-64).

officers were in possession of information -- obtained during conversations with his mother and brother -- which circumstantially inculpated petitioner in these offenses (A. 7-8, 80-92, 98-101). Specifically, the officers had been told that petitioner had had blood on his trousers when he returned home on November 6, 1978, that he had been in possession of a black watch on that date, and that he had been riding a blue bicycle (A. 84-85, 88-92, 98-102). Other evidence adduced at trial indicated that a similar watch had been taken from the residence during the burglary (A. 5, 94-96, 322), and established that a blue bicycle had been taken from a nearby house during the night on which these offenses occurred (A. 1, 5, 57, 315-16).

Petitioner was first interrogated on November 9, 1978, and denied any involvement in the burglary or the homicide (A. 80-104). The inculpatory statement was obtained during a subsequent interrogation approximately two weeks thereafter (A. 5-6). During the testimony of one of the interrogating officers, Detective Ojeda, regarding the questioning on November 9th, the prosecutor elicited extensive testimony from the officer concerning the statements of the mother and brother of petitioner, as detailed above; he testified that he had "confronted" petitioner with these statements when petitioner denied involvement in the offenses (A. 80-94), but that petitioner had not given inculpatory responses when he was so "confronted", and had denied the truth of the most incriminating of the statements (A. 84-93, 98).

Trial counsel for petitioner repeatedly objected to the introduction of the out-of-court statements (A. 84-85, 88-93, 95). Although the prosecutor never requested that the statements be admitted as non-hearsay, the court ruled that they were not being introduced for the "truth of the matter to be asserted" but to show "what the defendant heard" during the interrogation, and the court overruled the objections of counsel (A. 93-96).[2] The court so instructed the jury (A. 97-98).

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[2] The same sequence of events occurred during the testimony of the other interrogating officer, Detective Zatrepalek (A. 8).

In his closing argument, counsel for petitioner remarked on the failure of the prosecution to present the mother and brother of petitioner at trial (A. 110-12). The prosecutor responded by urging the jury to accept their statements as true:

> They gave their statements back on November the 9th. At that time, Mr. Breedlove was being interviewed by Ojeda and Zatrepalek. They gave their statements to another detective.
>
> They did not know he was being charged at that point with first degree murder. They told the truth at that point.
>
> You can rest assured of one thing; you can be as certain of this as you can that you are sitting in those seats right now: If the statements of Mary Gibson and Elijah Gibson did not say exactly what Detective Ojeda and Detective Zatrepalek told you they said, Mr. Zenobi [counsel for petitioner] would have brought it out to you. He would have brought Mary Gibson in here and Elijah Gibson in here, and they would have told you, "We did not say those things."
>
> * * *
>
> Now, with respect to Mary Gibson and Elijah Gibson, who would be in a better position to testify for the defendant than his own mother and brother, if they had anything helpful to say, and that is why I would ask you to use common sense and your ordinarily good judgment. Do not --
>
> * * *
>
> . . . Do not have any doubt whatsoever about what Mary Gibson and Elijah Gibson told the police, because if there was a conflict, they would be in here telling you about it (A. 115-17).

A motion for mistrial, on the ground that the prosecution had put the truth of the out-of-court statements into issue despite the introduction of those statements as non-hearsay, was denied by the trial court (A. 118-21).

Petitioner was acquitted of the charge of attempted murder, and convicted of the other offenses charged (A. 1). During the course of the subsequent penalty hearing, the prosecution sought to introduce the testimony of a medical examiner concerning "the amount of suffering that the victim did suffer", asserting that the testimony was relevant to establish the aggravating circumstance specified in Section 921.141(5)(h), Florida

Statutes (1977)(A. 130).[3] Objections to this testimony on the ground that it was not relevant to establishing this aggravating circumstance were overruled (A. 138-41), and the witness was permitted to testify that the wound which had been inflicted on the victim had caused him "considerable" pain, and that he would have been conscious and aware of this pain prior to his death (A. 146-49).

Petitioner presented the testimony of three expert witnesses, two psychologists and a psychiatrist, who testified to the following conclusions: that petitioner suffers from "chronic paranoid schizophrenia" (A. 196, 198), that he has significant neurological dysfunction (A. 155, 170), and that, as a result, he has "definite impairment" of his ability to conform to the requirements of the law (A. 156, 175, 199-200). The prosecution presented two court-appointed psychologists who had examined petitioner prior to trial, and who testified that he did not suffer from schizophrenia or brain dysfunction; however, these witnesses did testify that petitioner "has long-standing behavioral and personality difficulty", that he "has had emotional problems for a prolonged period of time, from childhood or adolescence, which has been manifested by his misuse of drugs", that he had a "certain amount of impairment", and that it was possible that petitioner "had a diminished capacity as a result of drug and alcohol intoxication" (A. 224, 226-27, 236-38, 242).

Counsel for petitioner requested that the following definition of the aggravating factor of an "especially, heinous, atrocious, or cruel" homicide, see §921.141(5)(h), Fla.Stat. (1977), be given:

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[3] This witness, Dr. Wright, did not perform the autopsy on the victim in this case (A. 143); the prosecutor represented to the trial court that the pathologist who performed the autopsy (and who testified during the guilt/innocence phase of the trial) was "out of the country", and that Dr. Wright would testify based upon his review of the autopsy notes (A. 130). Dr. Wright, on voir dire by counsel for petitioner, testified that his conclusions were based upon his review of the autopsy reports and photographs (A. 139). The trial court permitted the witness to testify, over objection of counsel (A. 139).

> The aggravating [circumstance] that the capital felony was especially heinous, atrocious, or cruel, applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless [sic] or pit[i]less crime which is unnecessarily tortuous to the victim. (A. 68).

The court refused to give this instruction (A. 213).

In its instructions to the jury, the court defined the aggravating circumstance specified in subsection (5)(h) as follows:

> . . . that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> Now, "heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked or vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless. (A. 288).

The jury subsequently returned an advisory verdict recommending the imposition of a death sentence (A. 299-300). In imposing a death sentence, the court found in pertinent part:

> The murder was especially heinous, atrocious or cruel. The victim, Frank Budnick, was asleep in bed along with Carol Meoni when the defendant entered the bedroom with a large butcher knife. The evidence indicated that the defendant approached the bed and began stabbing and slashing with the knife at Frank Budnick. There was a large slash tear found in the pillow slip where the victim had been sleeping. Carol Meoni, who was sleeping next to the victim, was stabbed in the face (Ms. Meoni survived the attack). Both the victim and Ms. Meoni sustained "defensive" wounds on their hands. The victim's right hand had five (5) distinct wounds. The fatal blow resulted when the defendant plunged the knife into the victim's upper chest with tremendous force. The knife fractured the clavicle (collar bone) as it entered the body and proceeded to sever the subclavin vein. The knife punctured the left lung and came to rest in the muscles of the shoulder blade. The medical examiner described the injury as a penetrating knife wound approximately five and one half (5 1/2) inches deep, which would result in considerable pain. The victim got out of bed, stated "I'm bleeding," and walked outside into the front yard where he tried to call for help and then collapsed. The medical examiner stated that while he was conscious the victim would have

> experienced the additional sensation of drowning as fluid flowed into his lung. The mechanism of death was that the victim drowned in his own blood. (A. 50).

The court rejected the mitigating evidence, imposed a sentence of death on the murder count of the indictment, and prison terms on the remaining counts (A. 53-54). A timely appeal was taken to the Supreme Court of Florida, on which it was asserted, in pertinent part: 1) that the admission into evidence of the out-of-court statements of the mother and brother of petitioner, and the reliance by the prosecution upon the truth of those statements, violated the Confrontation Clause of the Sixth Amendment; and 2) that the application in the trial court of Section 921.141(5)(h) violated the Eighth and Fourteenth Amendments in that the court permitted the introduction of irrelevant and prejudicial evidence on this factor, provided the jury with insufficient guidance for applying it, and improperly found it to be applicable to this case. (A. 311-50).

In ruling on the first claim, the Court held that the out-of-court statements were properly introduced at trial:

> At trial Detective Ojeda and Zatrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor the brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause.
>
> * * *
>
> The court properly admitted the detectives' testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury on how to use this testimony. (A. 7, 9).

The court did find that the argument of the prosecutor that the mother and brother had "told the truth in those statements", was "improper" (A. 8-9). However, because counsel for petitioner had referred to the absence of the witnesses from the trial prior to the improper prosecutorial argument, and to the substance of their testimony after the prosecutor injected the truth of those

statements into issue (and the court overruled an objection to that argument), the court held that "[c]onsidering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial." (A. 9-10).

The court further held that the trial court had properly found the homicide in this case to be within the scope of Section 921.141(5)(h):

> . . . The trial court properly found the murder to be heinous, atrocious, and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place. (A. 12-13).

REASONS FOR GRANTING THE WRIT

I

THE CIRCUMVENTION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IN THIS CASE BY INTRODUCING PREJUDICIAL OUT-OF-COURT STATEMENTS IN THE GUISE OF NON-HEARSAY AND THEN ASSERTING THE TRUTH OF THOSE STATEMENTS PRESENTS CONSTITUTIONAL QUESTIONS OF CONTINUING IMPORTANCE CONCERNING THE INTERPLAY OF STATE HEARSAY RULES AND THE CONFRONTATION CLAUSE, AND THE APPROVAL OF THAT PROCEDURE BY THE SUPREME COURT OF FLORIDA IS IN CONFLICT WITH HOLDINGS OF THE UNITED STATES COURTS OF APPEALS, WARRANTING REVIEW OF THE DECISION IN THIS CASE BY THIS COURT.

This Court has frequently addressed the complex relationship between the Confrontation Clause of the Sixth Amendment and state hearsay rules. See, e.g., Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970). Indeed, Pointer v. Texas, 380 U.S. 400 (1965), the decision in which this Court held that the confrontation requirement of the Sixth Amendment is made obligatory on the States by the Fourteenth Amendment, arose from the introduction of prior recorded testimony -- generally held to be admissible as an exception to the common-law hearsay rule -- in a state trial. Pointer held that the introduction of such

testimony nonetheless violated the Sixth Amendment since the out-of-court statements in that case "had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine" the absent witness. 380 U.S. at 407.

Subsequent decisions of this Court, while recognizing that the confrontation guarantee and the common-law hearsay rule "stem from the same roots", Dutton v. Evans, supra at 86 (footnote omitted), have also rejected any contention that "the overlap is complete." California v. Green, supra at 155. Rather, the function of the Confrontation Clause in this context "is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" Dutton v. Evans, supra at 89 (citation omitted). The application of this rule requires a balancing of the constitutional preference for face-to-face confrontation of adverse witnesses, and the interest of the states in formulating rules of evidence in state criminal trials; consequently, the principles established by this Court have been developed on a case-by-case basis:

> This Court, in a series of cases, has sought to accomodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. This Court has not sought to "map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay 'exceptions.'" Ohio v. Roberts, supra at 2538.

Nonetheless, as this Court recognized in Roberts, "a general approach to the problem is discernible." Ibid. Three basic rules are laid down in the line of decisions which begins with Pointer. First, if an out-of-court statement is introduced, there must be an adequate opportunity for cross-examination of the declarant, either at the time that the out-of-court statement was made, or at trial. California v. Green, supra at 157-61; see also Douglas v. Alabama, 380 U.S. 415, 419-20 (1965); Pointer v. Texas, supra at 406-08. If such an opportunity exists, there is

an additional two-part predicate which must be met by the prosecution:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.
>
> The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact-finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." Ohio v. Roberts, supra at 2538-39 (citations and footnote omitted).

See also Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972); Dutton v. Evans, supra at 87-89; Berger v. California, 393 U.S. 314, 315-16 (1969); Barber v. Page, 390 U.S. 719, 722-24 (1968).

The third prong of this test, whether the statement bears sufficient "indicia of reliability", is not reached until the first two are satisfied. Ohio v. Roberts, supra; Mancusi v. Stubbs, supra. In the present case, it is indisputable that the first two predicate requirements were not and cannot be satisfied; the out-of-court statements were made to a police officer during the course of his investigation and the declarants did not testify at trial, so there was obviously no opportunity for cross-examination, and not only were the declarants not shown to be unavailable as witnesses, it was expressly conceded that they were available (A. 113-17). Accordingly, had the prosecution in this case sought to straightforwardly introduce the out-of-court statements, there is no question but that the previous decisions of this Court would have barred their admission.

But this case has a unique twist to it, one which this Court has not previously addressed, and one which, if applied to its logical extent, would vitiate the rules established by this Court in its confrontation-hearsay decisions. The out-of-court

statements in this case were introduced as ostensible non-hearsay, that is, not for the "truth of the matter to be asserted" therein, but to show "what the [petitioner] heard" during the interrogation (A. 93-96).[4] With the objections to these statements having been overruled, counsel for petitioner addressed the absence of the witnesses in his opening argument to the jury (A. 110-12), and the prosecutor responded by flatly asserting that these statements were in fact true and should be taken as such by the jury (A. 113-17).[5]

Accordingly, the situation presented in this case is as follows: otherwise inadmissible -- and prejudicial -- testimony is admitted in the guise of non-hearsay; counsel for the accused comments before the jury on the absence of the declarants; the prosecutor responds by asserting the truth of the out-of-court statements to the undeniable prejudice of the accused; and the Confrontation Clause is held not be violated because counsel addressed the testimony. Such sleight-of-hand cannot mask a violation of the Sixth Amendment.

This Court had occasion to address an analogous series of

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[4] Florida hearsay law permits the introduction of out-of-court statements which in fact produce a confession by an accused as non-hearsay testimony. Brown v. State, 367 So.2d 616, 624 (Fla. 1979); McCumber v. State, 182 So.2d 627, 628 (Fla. 3d DCA 1966). The application of this rule in this case is, at the very least, highly questionable, in that the out-of-court statements of the mother and brother of petitioner did not produce incriminating statements by petitioner; after being confronted with these statements, petitioner continued to deny his involvement in these offenses, and the trial court, in overruling the objections to the statements, recognized as much but nonetheless admitted the statements (A. 93-94). And the Supreme Court of Florida seems to have ignored this rather critical fact, holding that the statements "came in to show the effect on Breedlove rather than for the truth of those comments." (A. 9).

[5] The Supreme Court of Florida did not hold that the arguments of the prosecutor were fair reply to the statements of counsel for petitioner, and no such holding was possible under well-established Florida law. Florida adheres to the general principle that addressing evidence which is admitted over objection does not waive any claim that the evidence was improperly admitted. See, e.g., Louette v. State, 152 Fla. 495, 12 So.2d 168, 174 (1943). Furthermore, Florida law provides that it is entirely proper both for counsel for an accused to argue the absence of potential prosecution witnesses and for a prosecutor to respond by asserting that the accused could have presented these witnesses, but that it is totally improper for a prosecutor to go beyond such response and to argue that the absent witnesses would have testified favorably for the prosecution. Wilder v. State, 355 So.2d 188 (Fla. 1st DCA 1978).

events in Douglas v. Alabama, supra, in which the prosecution presented as a witness a co-defendant who had previously been convicted of the charges against him but whose conviction was to be appealed; the co-defendant accordingly relied on the privilege against self-incrimination and refused to answer any questions concerning the offenses. 380 U.S. at 416. The prosecutor, in the guise of cross-examining a "hostile witness", read into evidence the entirety of a post-arrest statement given by the witness which "recited in considerable detail the circumstances leading to and surrounding the alleged crime", and which was highly prejudicial to the defendant. Id. at 416-17.

This Court held that this procedure violated the Sixth Amendment:

> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . 380 U.S. at 419 (citations omitted).

In accordance with this holding, the Courts of Appeals have consistently held that the admission into evidence of damaging out-of-court statements in the guise of non-hearsay nonetheless violates the Confrontation Clause where the probable purpose and/or impact of the statements is founded upon the truth of the matters asserted therein. See, e.g., United States v. Day, 192 U.S.App.D.C. 252, 591 F.2d 861, 881-83 (1979); United States v. Check, 582 F.2d 668, 678-81 (2d Cir. 1978); Stewart v. Cowan, 528 F.2d 79, 85-87 (6th Cir. 1976); Favre v. Henderson, 464 F.2d 359, 361-64 (5th Cir. 1972), cert. denied, 409 U.S. 942 (1972); United States v. Johnson, 439 F.2d 885, 888 (5th Cir. 1971), cert.

denied, 404 U.S. [illegible] (1971). The same conclusion has also been reached where the out-of-court statements were only referred to on cross-examination, and the declarant was never presented as a witness at trial. Harris v. Spears, 606 F.2d 639, 640-41 (5th Cir. 1979).

Of course, the resolution of this case does not turn upon whether the jury might have inferred the truth of the out-of-court statements on its own; the jury was urged to do so by the prosecutor, with the apparent approval of the trial court. A similar situation was addressed in United States v. Ragano, 476 F.2d 410 (5th Cir. 1973), in which the defendant was charged with having falsely declared income received from the sale of certain stock. Id. at 412. The defendant had been questioned by a revenue agent during the course of the investigation, and the agent had recounted the statements of another individual, S.A. Rizzo. Id. at 414-15. Rizzo had been involved in the stock transactions with the defendant, and his statements were critical to the issue at trial, which was whether the defendant had received the stock as a legal fee or in exchange for a promissory note. Id. at 412, 414.

As in this case, the trial court instructed the jury not to consider the testimony for its truth, but only in evaluating the statements of the defendant to the agent. 476 F.2d at 414 n.6. Thus, as in the present case, the testimony in Ragano was admitted as non-hearsay, in connection with the statements of the defendant to a law enforcement officer. However, as in this case, the defendant "flatly denied the truth" of the out-of-court statements, and, as here, the prosecutor in Ragano argued to the jury that the alleged non-hearsay was in fact true. 476 F.2d at 415. The Court held that the statements were not properly introduced as non-hearsay, but further held that the Confrontation Clause was violated by the manner in which the statements were utilized by the prosecution:

> The confrontation clause of the Sixth Amendment is not violated as long as "the declarant is testifying as a witness and subject to full and effective cross-examination." But here Rizzo did not testify, and, of course, was not subject

> to cross-examination. In short, the prosecutor succeeded in getting Rizzo's testimony before the jury and in exploiting it in his closing argument without calling Rizzo as a witness. 476 F.2d at 415 (citation omitted).

Douglas and the line of authority discussed above thus condemn the procedure employed in this case and approved by the Florida courts. This Court has addressed the propriety of relying upon alleged non-hearsay as substantive evidence of guilt in the context of a federal criminal trial, see Moore v. United States, 429 U.S. 20 (1976), but has not had occasion to address such a procedure under the Confrontation Clause. The conflict between the holding in this case and the decisions of the federal courts on this issue warrants review by this Court, and the need to enforce the constitutional principles announced in Pointer, and consistently adhered to by this Court, mandates such review.

II

> THE OVERLY-BROAD APPLICATION OF SECTION 921.141(5)(H), FLORIDA STATUTES (1977), PROVIDING AS AN AGGRAVATING CIRCUMSTANCE IN CAPITAL CASES THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL", BY THE STATE TRIAL COURT AND SUPREME COURT IN THIS CASE, PRESENTS CONSTITUTIONAL QUESTIONS OF CONTINUING IMPORTANCE CONCERNING THE APPLICATION OF THE PRINCIPLES ESTABLISHED IN GODFREY V. GEORGIA, 446 U.S. 420 (1980) TO THE FLORIDA DEATH PENALTY STATUTE.

Section 921.141(5)(h), Florida Statutes (1977), establishes as a potential aggravating circumstance in capital cases that "[t]he capital felony was especially heinous, atrocious, or cruel." In its first decision construing the Florida death penalty statute, the Supreme Court of Florida rejected a challenge to this circumstance on vagueness grounds, and construed it in the following manner:

> . . . [W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the

> capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)(emphasis supplied).

In approving subsection (5)(h) as constitutional in Proffitt v. Florida, 428 U.S. 242, 255-56 (1976), this Court relied upon this construction:

> That court has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. (citations omitted).

At every level of the three-step Florida capital sentencing procedure, this aggravating circumstance was applied far beyond these narrowly-drawn parameters. Before the jury, the prosecution was permitted to elicit speculative testimony concerning the pain which would theoretically have been experienced by the victim (A. 130-49). And, despite a specific request by counsel for petitioner to instruct the jury that subsection (5)(h) was limited to cases in which the homicide "was accompanied by such additional acts as to set the crime apart from the norm of capital felonies", State v. Dixon, supra at 9 (A. 6-8), the court refused to do so (A. 213). Rather, the entirety of the definition of this aggravating circumstance provided to the jury was as follows:

> . . . that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
> Now, "heinous" means extremely wicked or shockingly evil.
> "Atrocious" means outrageously wicked or vile.
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless. (A. 288).

The sentencing order of the trial court, which finds

subsection (5)(h) applicable to this case, is based in significant part upon the testimony that the victim would have suffered great pain (A. 50).[6] On appeal, this finding was affirmed on the following basis:

> . . . Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place. (A. 12-13).

The court thus rejected, at least implicitly, the reliance by the trial court upon the theoretical expert testimony presented by the prosecution at the sentencing hearing, in accord with its own prior precedent in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), one of the decisions relied upon by this Court in its approval of the Florida statute in Proffitt v. Florida, supra. 428 U.S. at 255. However, rather than reversing the finding of the trial court, the Supreme Court substituted a new rationale for applying subsection (5)(h); regardless of the validity of this rationale, it was clearly improper for it to be injected for the first time on appeal. Presnell v. Georgia, 439 U.S. 14 (1978).

Moreover, the holding of the state supreme court in this

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[6] Also indicative of the standardless application of subsection (5)(h) by the trial court are its findings that "defendant approached the bed and began stabbing and slashing with the knife" at the victim, and its reliance upon wounds allegedly inflicted upon the victim of the attempted murder charge in Count II of the indictment (A. 50, 55-56). With regard to the first of these findings, the only direct evidence of the circumstances of the homicide was the statement of petitioner that he had stabbed the victim once as the latter awoke and seized him (A. 63-64). There was no evidence that he had "approached the bed and began stabbing and slashing with the knife" (A. 50); indeed, the medical examiner who performed the autopsy testified that he could not determine the position of the victim at the time of the stabbing (A. 72-79).

With regard to the reliance by the court upon the alleged assault upon another individual, the court apparently overlooked the fact that petitioner was acquitted of this offense (A. 1). See Ashe v. Swenson, 397 U.S. 436 (1970). In addition, Florida law provides that assaults upon other persons are irrelevant to determining the applicability of subsection (5)(h). See Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979).

case is totally invalid under its own prior precedent. The primary thrust of the finding of the court is that the homicide occurred in a private home, "while the victim lay asleep in his bed."[7] Not only has this reasoning never previously been articulated by the Supreme Court as a basis for applying subsection (5)(h), but its own precedent establishes that it is not.

In Tedder v. State, supra, the defendant fired at his wife and mother-in-law, pursued them into their home, fatally shot his mother-in-law, and forced his wife to leave with him, refusing to allow her to attend to her dying mother. 322 So.2d at 909. The court nonetheless held that this homicide was not "especially heinous, atrocious, or cruel":

> It is apparent that all killings are atrocious, and that appellant exhibited cruelty, by any standard of decency, in allowing his injured victim to languish without assistance or the ability to obtain assistance. Still, we believe the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder. Id. at 910 (footnote omitted).

See also Lewis v. State, 398 So.2d 432, 434-48 (Fla. 1981)(victim seated in his bedroom watching television when defendant and an accomplice "simultaneously fired upon him from outside the bedroom window, using a .30-.30 rifle, and a 12-gauge shotgun", inflicting multiple fatal wounds; court held subsection (5)(h) inapplicable).[8]

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[7] As previously noted, the evidence adduced at trial does not establish that the victim was "asleep in his bed" at the time of the incident. The medical examiner who performed the autopsy on the victim testified that he had died as the result of a single stab wound, and that no conclusion could be drawn as to whether he had been in bed or moving toward petitioner at the time that the wound was inflicted (A. 72-79). Moreover, the post-arrest statement of petitioner establishes that he had "panicked" when the victim awoke and seized him, and that he had "swung back with the knife" at the victim (A. 63-64).

[8] Moreover, to the extent that the holding of the court is based upon the fact that the homicide occurred in a residence, it is but another characterization of the fact that it occurred during a burglary, a fact considered by the trial court as giving rise to another aggravating circumstance, see §921.141(5)(d), Fla.Stat. (1977). (A. 49). Indicative of the overly-broad application of subsection (5)(h) by the Supreme Court of Florida is that the court, in making this finding, violated its own rule prohibiting the "doubling up" of aggravating circumstances based (Cont.)

Thus, at every stage of the proceedings in this case -- before the jury, the trial court, and the state supreme court -- subsection (5)(h) was applied in a manner totally inconsistent with the rules established in Dixon and approved in Proffit. The instructions to the jury provided insufficient guidance for determining the applicability of this circumstance, particularly in light of the prejudicial evidence submitted by the prosecution, the trial court based its findings upon that evidence and other impermissible and unfounded considerations, and the Supreme Court of Florida approved that finding based upon equally impermissible considerations.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980), this Court considered a similar breakdown in the construction and application of a virtually-identical aggravating circumstance. The pertinent Georgia aggravating circumstance, Georgia Code Ann. §27-2534.1(b)(7), provides as an aggravating circumstance that the homicide "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In Gregg v. Georgia, 428 U.S. 153, 200 (1976), this Court held that circumstance constitutional based upon its construction by the state courts:

> The petitioner attacks the seventh statutory aggravating circumstance, which authorizes imposition of the death penalty if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim", contending that it is so broad that capital punishment could be imposed in any murder case. It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury's decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, and that homicide was a horrifying torture-murder. (citation and footnote omitted).

In Godfrey, the defendant was convicted of murdering his wife and mother-in-law with a shotgun. 100 S.Ct. at 1763. In

upon a single aspect of a capital offense. See, e.g., Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977).

instructing the jury on subsection (b)(7), the trial court merely recited the statutory language, and the jury, in returning its verdict, found it to have been proven, based upon the statutory language. Id. at 1764. On appeal, the Supreme Court of Georgia held that the instructions of the trial court were sufficient to define the aggravating circumstance. Ibid.

This Court first held that the jury had been improperly instructed:

> In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. They gave the jury no guidance concerning the meaning of any of §(b)(7)'s terms. In fact, the jury's interpretation of §(b)(7) can only be the subject of sheer speculation. 100 S.Ct. at 1765 (footnotes omitted).

This Court further held that the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." Ibid. The decision notes that the state court, in prior decisions, had "apparently understood [its] . . . obligation to keep §(b)(7) within constitutional bounds", and had limited its applicability to those cases in which the facts of the offense "demonstrate[d] 'torture, depravity of mind, or an aggravated battery to the victim'", demonstrated "the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim", and where there was evidence of "serious physical abuse of the victim before death." 100 S.Ct. at 1766 (footnote omitted). The Court held that the Georgia court had departed from those limitations in Godfrey:

> The Georgia courts did not, however, so limit §(b)(7) in the present case. . . .
>
> Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind. . . ." We conclude that the answer must be no. The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder.
>
> * * *
>
> . . . There is no principled way to distinguish this case in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentence is reversed. . . . 100 S.Ct. at 1767 (footnotes omitted).

The application of Godfrey to the Florida death penalty statute presents questions of fundamental constitutional importance which should be addressed by this Court. Florida, like Georgia, has construed subsection (5)(h) as limited to cases in which there was proof of "additional acts". State v. Dixon, supra at 9. This case, however, involves a homicide committed by the infliction of a single stab wound, a jury exposed to prejudicial testimony and insufficiently guided as to the meaning of subsection (5)(h), a sentencing order based upon irrelevant and inappropriate findings, and an unprincipled approval of those findings by the Supreme Court of Florida. As construed in this case, subsection (5)(h) is impermissibly vague and overbroad -- indeed, standardless -- and review by this Court is essential to limit the application of this aggravating circumstance in Florida in accordance with the principles established in Proffitt and Godfrey.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests this Court to issue its Writ of Certiorari to review the decision of the Supreme Court of Florida in this cause.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

McARTHUR BREEDLOVE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

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Portions of Appx. on file in Clerk's Office

Supreme Court of Florida

No. 56,811

McARTHUR BREEDLOVE,
a/k/a McARTHUR JENKINS, Appellant,

v.

STATE OF FLORIDA, Appellee.

[March 4, 1982]

PER CURIAM.

McArthur Breedlove appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and affirm the results of his trial.

A five-count indictment charged Breedlove with first-degree murder, attempted first-degree murder, burglary, grand theft, and petit theft. The charges stemmed from the stabbing death of one victim and the wounding of another which occurred during the burglary of their dwelling. The jury acquitted Breedlove of attempted murder, but convicted him of the other charges. Concurring in the jury's recommendation, the trial court imposed the death sentence for the murder conviction. The court also imposed consecutive sentences of life imprisonment for burglary, five years for grand theft, and sixty days for petit theft.

Breedlove presents six points on appeal: 1) Brady[2] violation; 2) denial of motion to suppress; 3) improper admission of hearsay; 4) improper remarks by prosecutor during closing

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1 Art. V, § 3(b)(1), Fla. Const.

2 Brady v. Maryland, 373 U.S. 83 (1963).

[illegible] 1

argument; 5) conviction and sentence for burglary violate double jeopardy clause; and 6) impropriety of death sentence.

In four motions defense counsel requested the production of police reports made by six police officers and detectives and of field investigation cards filed on "suspicious" persons. The trial court denied all four motions without recorded comment. The requested material, along with other unrequested reports, was deposited with the judge who examined it in camera and ordered portions of the material released to defense counsel. All formal statements of persons connected with the case were also furnished to the defense.

On appeal Breedlove claims that the state violated the admonition of Brady v. Maryland, 373 U.S. 83, 87 (1963), that

> suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.

In making this claim, Breedlove relies on unfurnished portions of a Detective McElveen's report.[3] This report reflects the substance of a conversation that McElveen had with Breedlove's mother, Mary Gibson, and his brother, Elisha Gibson, to the effect that the mother had not seen several items stolen from the victims' residence in Breedlove's possession and that Breedlove had returned home around 2:30 a.m. (the approximate time of the murder) and had left again between 4:00 and 4:30 a.m. This report also states that both the mother and brother referred to blood on Breedlove's clothes and that the brother described items, later established to have been taken from the victims' residence, which he saw in Breedlove's possession on his return home at approximately 2:30 a.m.

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[3] After his in camera inspection, the trial judge sealed the police reports. Breedlove's appellate counsel had access to the sealed reports after trial to assist in preparing this appeal. Only McElveen's report is specifically referred to on appeal, and inspection of the reports reveals McElveen's report to be the only one containing possibly favorable information which the defense might not have received in some fashion.

Breedlove's argument on this point, however, ignores, except for one accord reference, United States v. Agurs, 427 U.S. 97 (1976). In Agurs, the Supreme Court identified three discovery situations: 1) undisclosed evidence demonstrates the prosecutions's use of perjured testimony; 2) a pretrial request for specific evidence (Brady); and 3) a general request for "Brady material" (Agurs). McElveen's report falls within the third category, and Agurs is controlling on this point.

The state provided two lists of witnesses in which the names of sixteen law enforcement persons appear. These include officers, detectives, technicians, and a stenographer. Although McElveen's name is on the first list, he was not included in the motions for production which specified the reports of six officers and detectives by name. The record reflects no formal request for all "Brady material," but we believe that McElveen's report, as well as those of the other unspecified law enforcement personnel, is within Agurs' third situation.

Brady's broad holding has been limited somewhat by Agurs:

> [T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

427 U.S. at 108. Furthermore, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 109-10. In response to claims very similar to Breedlove's, this Court recently stated that "[d]isclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation." Perry v. State, 395 So.2d 170, 174 (Fla. 1980). The record shows that the trial court carefully observed Breedlove's discovery rights. Breedlove has failed to demonstrate that the material contained in McElveen's report could not have been found through reasonably

diligent preparation or that nonproduction of this report prejudiced him.

Breedlove also claims that the police reports are discoverable per se as "statements." Florida Rule of Criminal Procedure 3.220 covers statements which are discoverable and defines a "statement" as

> a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement. . . .

Fla. R. Crim. P. 3.220(a)(1)(ii). The courts of this state have generally held that police reports are not "statements," except of the officers making them, and that generally they are not discoverable per se as statements of those officers. See State v. Johnson, 284 So.2d 198 (Fla. 1973); Lockhart v. State, 384 So.2d 289 (Fla. 4th DCA 1980); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980); Dumas v. State, 363 So.2d 568 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 471 (Fla. 1979); Pitts v. State, 362 So.2d 147 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1372 (Fla. 1979); Miller v. State, 360 So.2d 46 (Fla. 2d DCA 1978); State v. Lattimore, 284 So.2d 423 (Fla. 3d DCA 1973), cert. denied, 291 So.2d 7 (Fla. 1974); State v. Gillespie,[4] 227 So.2d 550 (Fla. 2d DCA 1969). The material in the instant reports does not comprise "statements" because the reports have not been signed, adopted, or approved by the persons (other than the officers) to whom they have been attributed, they do not appear to be substantially verbatim, and they were not recorded contemporaneously with their making. We do not find that these reports are discoverable as "statements" as set out in rule 3.220.

The motions to suppress filed by Breedlove's attorneys sought exclusion of any statements by Breedlove, of evidence

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[4] Gillespie contains an analysis of what is and is not Brady material.

found at his mother's home, and of evidence found on his person. On appeal Breedlove only alleges error regarding admission of his statement of November 21, 1978. In that statement Breedlove admitted breaking into a dwelling, taking numerous items, stabbing a man, who had been asleep in a bedroom, with a butcher knife that Breedlove had taken off a table in the living room, and stealing a bicycle to make his getaway. Breedlove alleges that the police violated his fifth amendment rights in obtaining that statement.

Upon learning that Breedlove was in custody, a Detective Nagle of the Hallandale Police Department requested permission to interview him concerning a murder that had occurred in Hallandale several years earlier. Detective Zatrapalek of the North Miami Beach Police Department, lead officer on Breedlove's case, had Breedlove brought over from the county jail. Robert Shultz, a counselor at the jail, escorted Breedlove downstairs and turned him over to two officers.

At the suppression hearing, Shultz testified that Breedlove had said something like "They had better be the people I want to talk to" or "I don't want to talk to certain detectives." He also stated that, on seeing the officers, Breedlove said, "I am not talking to them," and the officers "said something to the effect that 'Eventually you will talk to us.'" On appeal Breedlove claims that these statements show that he tried to exercise his right to remain silent and that his subsequent statement is invalid because the police did not "scrupulously honor" (Michigan v. Moseley, 423 U.S. 96, 104 (1975)) his refusal to talk to them.[5]

Shultz also testified that it was his duty to report any improper police behavior but that he had not observed any improper behavior regarding Breedlove. Shultz had known Breedlove since his incarceration and testified that he had never noticed

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[5] Appellant's brief states that Breedlove's public defenders had visited him in jail prior to the 21st and that he had agreed not to speak to police without counsel present.

signs of Breedlove's being physically abused and that Breedlove had never complained to him about being abused. Shultz also said that prisoners could refuse to leave their cells in order to avoid being interrogated, but that Breedlove had never done so.

After arriving at the station, Detective Zatrepalek read Breedlove his Miranda rights and Breedlove signed the rights form. Breedlove then asked to speak with his mother and was not questioned during the hour or so before she arrived. He spoke with her in private and then asked her to tell Zatrepalek that he would make a statement. After speaking with the detectives, Breedlove was again read his rights, signed another card, and made a formal statement. Zatrepalek testified that he had never beaten Breedlove and that, when interviewed by Detective Nagle on the following day, Breedlove asked Zatrapalek to stay with him.

Breedlove, on the other hand, testified that Detectives Zatrepalek and Ojeda had beaten him on November 9, that he refused to go with the officers on the 21st, and after being threatened on the 21st he confessed in order to avoid another beating.[6] The judge found that Breedlove understood his rights on both the 9th and 21st of November and that he freely and voluntarily waived those rights.

Breedlove now claims that the statement, "eventually you will talk to us," was an implied threat constituting coercion and tainting the ensuing statement so that no proper waiver occurred. From the totality of the circumstances, it does not appear that the statement was coerced. Rather, Breedlove chose not to exercise his right to remain silent or to have counsel present, making the damaging statement after talking with his mother. The judge properly concluded that he freely and voluntarily made the statement.

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[6] Breedlove's original public defender, David Finger, testified that, although Breedlove told him prior to the 21st that he had been beaten, Finger saw no evidence of physical abuse, never reported Breedlove's statements regarding the beating and later coercion on the 21st, and never investigated Breedlove's claims.

At trial Detectives Ojeda and Zatrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them, both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor the brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause.

Hearsay is an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement. Lombardi v. Flaming Fountain, Inc., 327 So.2d 39 (Fla. 2d DCA 1976).[7] Hearsay is inadmissible for three reasons: 1) the declarant does not testify under oath; 2) the trier of fact cannot observe the declarant's demeanor; and 3) the declarant is not subject to cross-examination. State v. Freber, 366 So.2d 426 (Fla. 1978). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." Dutton v. Evans, 400 U.S. 74, 88 (1970). In Dutton the Court went on to say that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U.S. at 161." 400 U.S. at 89. On the other hand, "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." Anderson v. United States, 417 U.S. 211, 219 (1974). Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose. Hunt v. Seaboard Coast Line Railroad Co., 327 So.2d 193 (Fla. 1976); Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is not directed to the

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[7] We note that ch. 81-93, Laws of Fla., slightly modified the definition of hearsay as set out in § 90.801(1)(c), Fla. Stat. (1981).

truth of the words spoken, but, rather, to whether they were in fact spoken. Id.

In the examination of Detective Ojeda the court sustained defense counsel's objection to his relating what Breedlove's mother said at her residence. Ojeda went on to testify that in talking with Breedlove on the 21st he told Breedlove what his brother had said about the bicycle. The court overruled the defense objection to this, stating that "it is not being offered for the truth of what was said." Other comments made by the mother and brother came in the same way; objections were overruled or sustained as needed. A side bar conference on hearsay was held, following which the judge gave the jury a cautionary instruction on Ojeda's testimony. Prior to cross-examination another side bar conference was held, wherein the defense said it would go into the Gibsons' statements because they had been received for an impermissible purpose. The court cautioned that defense would have to live with what this approach elicited. A similar course of events occurred during Detective Zatrepalek's testimony.

In closing argument, defense counsel brought up the Gibsons' comments and wondered why they had not been called to testify. The state also brought up these comments, referred to their sworn statements (not introduced at trial), said that they told the truth in those statements, and then tied their formal statements to the detectives' testimony.

Defense counsel used these statements by the prosecutor to move for a mistrial because of "putting the truth of Elijah and Mary Gibson's statements in issue," and also asked that the jury be told to disregard the detectives' testimony regarding what the Gibsons had said or else be given another cautionary instruction. Defense counsel also asked that the jury be told to disregard the state's closing argument. The court found the state's argument proper and refused to reinstruct, referring to his earlier cautionary instruction. Defense again referred to the mother and brother in its final argument.

The court properly admitted the detectives' testimony about what the Gibsons said because it came in to show the effect on Broedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury on how to use this testimony.

In their last motion for a new trial defense counsel cited the prosecutor's argument, alleging prejudicial error. The court denied the motion. A mistrial should be declared for prejudicial error which will vitiate the trial's result. Perry v. State, 146 Fla. 187, 200 So. 828 (1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. Id. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing.

The judge refused to renew his cautionary instruction regarding the use of testimony referring to the Gibsons' statements and included no such instruction in those given before the jury retired to deliberate. The questions, therefore, are whether the prosecutor's comments transformed the nonhearsay material into hearsay and whether those comments were so prejudicial that this Court cannot say beyond a reasonable doubt that they had no effect on the verdict. Chapman v. California, 386 U.S. 18 (1967).

It appears that the prosecutor's remarks were improper. These remarks, however, were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements. On rebuttal defense counsel mentioned the stolen bicycle being found at the Gibson home. He went on to say that the bicycle

> could have been ridden by the other four adults in that house, and what about those people? What did they do? They pointed the finger at my client.
>
> Sure it is his mother and brother. I do not like mothers and brothers testifying like that against my client. They said, "He did it. He is the one."

Mr. Godwin would have you believe we can call people like that.

(Emphasis added.) It appears that defense counsel admitted that those statements were true. Considering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial.[8]

On appeal Breedlove alleges that the prosecutor made improper arguments to the jury, thereby violating Breedlove's right to a fair trial. Besides use of the Gibsons' statements, he points to three other prejudicial or inflammatory remarks: 1) allegations of other criminal acts (rape);[9] 2) "vituperative" characterization (referring to Breedlove as an animal);[10] 3) appeal to community prejudice (violence in Dade County).[11]

Wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962), cert. denied, 372 U.S. 904 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer.

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8 In denying the motion for new trial the judge responded to defense's objection to the state's entire argument by saying: "I think the context in which the argument was made was not prejudicial in nature."

9 Breedlove charges that the state implied that Breedlove wanted to rape the woman in the house he was burglarizing. In going through what had happened, the prosecutor said that because of the purse Breedlove knew that a woman lived there. This is a permissible inference. His next comment, however, is not supported by the evidence: "He went prowling through the house to find that woman." Although Breedlove was a convicted mentally disordered sex offender (California), evidence concerning his past record and tendencies was not presented to the jury until the sentencing phase.

10 The prosecutor characterized the killing as a "savage and brutal and vicious and animalistic attack;" he did not refer to Breedlove as an "animal."

11 The prosecutor said: "When we walk the streets we take our chances." In response to an objection the court said: "Stay on the evidence in this case." The prosecutor then said: "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place.

The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas Parramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935 (1972). A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained-of remarks. Id. Compare Parramore with Wilson v. State, 294 So.2d 327 (Fla. 1974).

The judge refused to grant a mistrial, finding the state's argument not prejudicial due to the context in which the objected-to remarks were made. Some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required.

Breedlove was convicted of both first-degree murder and burglary and received the death penalty for the former and a consecutive life sentence for the latter. On appeal he claims that Pinder v. State, 375 So.2d 836 (Fla. 1979), mandates that the burglary conviction and sentence be vacated because the state proved only felony murder, not premeditated murder. The state, on the other hand, claims that it presented sufficient evidence of premeditation to warrant both convictions and sentences and also that Pinder should be rejected because of Whalen v. United States, 445 U.S. 684 (1980). Breedlove's Pinder claim and the state's Whalen argument have been disposed of in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). We find, however, that Breedlove's contention is not really an issue in this case because the state introduced sufficient evidence of premeditation.[12] See Hegstrom. Because we find that the jury need

[12] This evidence includes, among other things, Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims.

not have convicted Breedlove of burglary in order to support the murder conviction, we affirm the convictions and sentences for both first-degree murder and burglary.

As his final point, Breedlove makes several attacks on the death sentence: simple felony murder as a basis for the death penalty violates the eighth and fourteenth amendments; improper aggravating circumstances; limited consideration of mitigating circumstances; and death penalty disproportionate in this case.

Breedlove claims that death is an excessive punishment for a simple felony murder, based on Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978). Both the United States Supreme Court[13] and this Court[14] have found that the death penalty is not per se violative of either the federal or state constitution. Breedlove has presented nothing which would compel a different conclusion.

Breedlove states that "this Court has uniformly reversed death sentences in pure felony-murder cases, absent such a finding of an intent to kill" and cites numerous cases in support of this contention. While most of these cases deal with felony murder, all but one[15] concern jury overrides. They are not applicable to the instant case and do not support the point that Breedlove tries to make.

The court found three circumstances in aggravation:[16] previous conviction of violent felony; homicide committed during a burglary; and heinous, atrocious, and cruel. Breedlove argues that an underlying felony cannot be used in aggravation, but presents nothing which compels declaring the felony-murder aggravating circumstance unconstitutional. The trial court properly found the murder to be heinous, atrocious, and cruel. Although

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[13] Gregg v. Georgia, 428 U.S. 153 (1976).

[14] State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

[15] Menendez v. State, 368 So.2d 1278 (Fla. 1979), was remanded for resentencing because of improper consideration of aggravating circumstances.

[16] No mitigating circumstances found.

death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

Breedlove also claims that the prosecutor improperly argued three nonstatutory aggravating factors to the jury: that the jury would make a recommendation only ("passing the buck"); that Breedlove would be eligible for parole; and that Breedlove showed no remorse. While these remarks may have stretched the bounds of proper argument, Breedlove does not appear to have been prejudiced because the court did not find them in aggravation. Cf. Menendez v. State, 368 So.2d 1281 (Fla. 1979) (improper aggravating circumstances found); Riley v. State, 366 So.2d 19 (Fla. 1978) (same).

Breedlove also complains that the court limited the range of mitigating circumstances allowed to be considered and that the instructions gave inadequate guidance for consideration and weighing of these circumstances. The instructions, however, were proper and adequate, and the court did not limit presentation of mitigating evidence.[17] Breedlove now claims that the court erred in failing to find the lack of intent to cause death and impaired mental capacity. Finding felony murder in aggravation was proper, and, after acknowledging the conflicting testimony regarding Breedlove's mental capacity, the court chose to find his capacity not impaired or diminished. In the sentencing order the court stated:

> [T]his Court, after weighing and considering the aggravating and mitigating circumstances, is of the opinion that no mitigating circumstances, either statutory, or by any

---

[17] Defense's presentation consisted of witnesses who testified about Breedlove's mental and emotional problems.

testimony, facts or circumstances presented at the advisory proceeding, exist which outweigh the aggravating circumstances.

In the light of properly found aggravating circumstances, with nothing found in mitigation, imposition of the death penalty was proper.

We therefore affirm Breedlove's convictions and sentences.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
SUNDBERG, C.J., Dissents: "Because I believe that the truth of the statements attributed to Elijah and Mary Gibson were put in issue by the prosecution such testimony by the state's witnesses constituted prejudicial hearsay. Hence, I am compelled to reverse the conviction and remand for a new trial."

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Supreme Court of Florida

WEDNESDAY, MAY 19, 1982

McARTHUR BREEDLOVE, etc.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 56,811

Circuit Court No. 78-17415
(Dade)

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Appellant, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

TC
cc: Hon. Richard P. Brinker, Clerk
Hon. Richard S. Fuller, Judge

Karen M. Gottlieb, Esquire
Elliot H. Scherker, Esquire
Diane Zimmer Leeds, Esquire
Alan T. Lipson, Esquire

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

CASE NO. 78-17415

HONORABLE RICHARD FULLER

THE STATE OF FLORIDA)
)
Plaintiff)
)
vs)
)
MCARTHUR BREEDLOVE,)
also known as)
MCARTHUR JENKINS)
)
Defendant)

RECORDED
APR 3 1979
RICHARD P. BRINKER
CLERK

S E N T E N C E

FILED
APR 2 1979
RICHARD P. BRINKER
CLERK

THIS CAUSE came before the Court for trial by jury, and after deliberations a verdict was rendered finding the defendant guilty of murder in the first degree, burglary, grand theft and petit theft.

Thereafter, a separate sentencing proceeding was conducted before the trial jury to determine whether the defendant should be sentenced to death or life imprisonment as authorized by Florida Statute 775.082. The jury duly deliberated and returned its advisory sentence. A majority recommended that this Court impose the sentence of death upon the defendant, McArthur Breedlove, also known as McArthur Jenkins.

Pursuant to Florida Statute 921.141 this Court is required to, and does, consider each of the mitigating and aggravating circumstances involved herein, and makes the following findings:

AGGRAVATING FACTORS:

(a) Whether the defendant was under sentence of imprisonment when the defendant committed the murder of which the defendant has been convicted.

FINDING:

The defendant was not under sentence of imprisonment when he committed the murder of which he has been convicted.

(b) Whether the defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person.

FINDING:

In 1969 the defendant was convicted and sentenced for two counts of assault with intent to commit rape and one count of burglary with the intent to commit rape. The facts giving rise to those convictions were that on May 18,1968 the defendant entered the residence of a Mrs. Angie Meza in Los Angeles, California. Mrs. Meza heard a noise in her child's room and went to investigate. As she walked into the hall, the defendant grabbed her, knocked her to the floor, got on top of her, and stuffed a handkerchief into her mouth. As she struggled, the defendant apparently heard a noise and fled.

Several minutes later Miss Hedda Shuhbaum was awakened by noises outside her bedroom window. She called the police. A few minutes later she heard a knock at her door and she opened it. The defendant ran into the room, grabbed her with both hands about her throat and threw her on her bed. He knelt over her and choked her, and then placed a pillow over her face. He pulled her nightgown up to her neck and exposed his penis. At that moment the police arrived. The defendant charged at a police officer and was shot in the stomach.

(c) Whether, in committing the murder of which the defendant has been convicted, the defendant knowingly created a great risk of death to many persons.

FINDING:

Although one other person was injured in the course of the murder, there is no evidence that in committing the murder of which the defendant has been convicted that he knowingly created a great risk of death to many persons.

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(d) Whether the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any burglary.[1]

FINDING:

The murder was committed while the defendant was engaged in the commission of or an attempt to commit a burglary.

(e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

FINDING:

There is no evidence that the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) Whether the murder of which the defendant has been convicted was committed for pecuniary gain.

FINDING:

The murder was committed during the commission of a burglary which the defendant committed for pecuniary gain. However, this Court specifically declines to consider this as an aggravating factor.[2]

(g) Whether the murder of which the defendant has been convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

FINDING:

There is no evidence the murder was committed to disrupt or hinder the lawful exercise of any governmental function

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1 The entire Section of F.S. 921.141(5)(d) provides as follows: "The (murder) was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

2 This Court is aware of the decision of Provence v. State, 337 So.2d 783(Fla.1976) in which it was held that it is improper for the Court to combine in its consideration of aggravating factors, subsection (d)(murder occurred in the commission of a robbery or burglary) and subsection (f)(that the crime was committed for pecuniary gain.)

OR 10350 PG 1790

or enforcement of laws.

(h) Whether the murder of which the defendant was convicted was especially heinous, atrocious or cruel.

FINDING:

The murder was especially heinous, atrocious or cruel. The victim, Frank Budnick, was asleep in bed along with Carol Meoni when the defendant entered the bedroom with a large butcher knife. The evidence indicated that the defendant approached the bed and began stabbing and slashing with the knife at Frank Budnick. There was a large slash tear found in the pillow slip where the victim had been sleeping. Carol Meoni, who was sleeping next to the victim, was stabbed in the face (Ms. Meoni survived the attack). Both the victim and Ms. Meoni sustained "defensive" wounds on their hands. The victim's right hand had five (5) distinct wounds. The fatal blow resulted when the defendant plunged the knife into the victim's upper chest with tremendous force. The knife fractured the clavicle (collar bone) as it entered the body and proceeded to sever the subclavin vein. The knife punctured the left lung and came to rest in the muscles of the shoulder blade. The medical examiner described the injury as a penetrating knife wound approximately five and one half (5½) inches deep, which would result in considerable pain. The victim got out of bed, stated "I'm bleeding," and walked outside into the front yard where he tried to call for help and then collapsed. The medical examiner stated that while he was conscious the victim would have experienced the additional sensation of drowning as blood flowed into his lung. The mechanism of death was that the victim drowned in his own blood.

MITIGATING FACTORS

(a) Whether the defendant has no significant history of prior criminal activity.

FINDING:

The defendant does have a significant history of prior criminal activity over a period of some ten (10) years since 1969, which has been set forth in detail in the aggravating findings (refer to aggravation finding(b)).

(b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

FINDING:

There is no evidence that the defendant was under the influence of extreme mental or emotional disturbance during the commission of the murder. In fact, he was so rational that he concealed his fingerprints, stole a bicycle to flee the scene, disposed of his bloody clothing, and sold the jewelry taken in the theft. The defendant was able to answer the charges facing him and able to adequately assist counsel in his defense at the trial.

(c) Whether the victim was a participant in the defendant's conduct or consented to the act(s).

FINDING:

The victim at no time and in no way consented nor participated in the conduct of the defendant's acts.

(d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.

FINDING:

The defendant acted entirely alone in committing the murder.

(e) Whether the defendant acted under extreme duress or under the substantial domination of another person.

FINDING:

There is no evidence that the defendant's actions were a result of his being under any form of duress or substantial

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domination of another.

(f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.

FINDING:

There was a conflict in the evidence as to the capacity of the defendant to appreciate the criminality of his conduct. The Defense presented evidence that the defendant suffered from schizophrenia, chronic paranoid type, exibited behavior similar to a person medically diagnosed as brain damaged, and would be inclined to either withdraw or behave inappropriately if he were involved in a stress situation. The defendant also claimed to have used drugs on the night of the murder and to have no recollection of what happened.

Two court-appointed experts testified that the defendant knew right from wrong and had the capacity to appreciate the criminality of his acts at the time of the offense. There was evidence that the defendant could think quite clearly, reason quite well, and did not suffer from any brain damage. The defendant's personality was characterized as sociopathic, that he knew right from wrong but just did not care.

The Court finds that the defendant's capacity to appreciate the criminality of the murder he committed was not impaired or diminished. The defendant knew right from wrong and set upon a conscious, wilful course of action. The facts of the crime are consistant with a sociopathic personality and it appears to the Court that the defendant knew exactly what he was doing at all times (refer to mitigation finding (b)).

(g) The age of the defendant at the time of the crime.

FINDING:

The defendant was far into his majority, thirty-one

(31) years of age at the time of the crime. His age is not a mitigating factor.

As a further finding:

This Court has used as a basis for consideration in imposing sentence no information whatsoever not known to the defendant and/or his counsel of record. Gardner v. Florida, 430 U.S. 349(1977).

Upon the preceding specific findings of fact, the Court bases its sentence. It is the opinion of this Court that there are sufficient aggravating circumstances which exist to justify the sentence of death, and this Court, after weighing and considering the aggravating and mitigating circumstances, is of the opinion that no mitigating circumstances, either statutory, or by any testimony, facts or circumstances presented at the advisory proceeding, exist which outweigh the aggravating circumstances. This Court therefore agrees and concurs with the advisory sentence and recommendation rendered to this Court by the trial jury.

It is therefore, the sentence of this Court that as to Count 1 of the indictment you, McArthur Breedlove, also known as McArthur Jenkins, be adjudicated guilty of murder in the first degree and that you be and hereby are sentenced to death for the murder of Frank Budnick. You, McArthur Breedlove, also known as McArthur Jenkins, are hereby notified that the judgment of conviction and the sentence of death are subject to automatic review by the Supreme Court of Florida.

As to Count III of the indictment, burglary, it is the judgment and sentence of this Court that you be adjudicated guilty and sentenced to a term of life imprisonment in the State Prison.

As to Count IV of the indictment, grand theft, it is the judgment and sentence of this Court that you be adjudicated

guilty and sentenced to a term of five (5) years in the State Prison.

As to Count V of the indictment, petit theft, it is the judgment and sentence of this Court that you be adjudicated guilty and sentenced to a term of sixty (60) days in the State Prison.

Each of these sentences is to be served consecutive to each other.

The defendant, McArthur Breedlove, also known as McArthur Jenkins is hereby remanded to the custody of the Department of Corrections for the purpose of carrying out the sentence of this Court at a time and by such manner as shall be prescribed by law.

DONE AND ORDERED in Miami, Dade County, Florida, this 30 day of March, 1979.

CIRCUIT COURT JUDGE

54 1980 OR 10350 1795

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY FALL TERM, 1978

78-17415

STATE OF FLORIDA

vs.

McARTHUR BREEDLOVE,
also known as,
McARTHUR JENKINS,

DEFENDANT.

INDICTMENT

I. - FIRST DEGREE MURDER
II. - ATTEMPTED FIRST DEGREE MURDER
III. - BURGLARY
IV. - GRAND THEFT
V. - PETIT THEFT

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of November, 1978, within the County of Dade, State of Florida, McARTHUR BREEDLOVE, also known as, McARTHUR JENKINS, did, unlawfully and feloniously, from a premeditated design to effect the death of FRANK BUDNICK, a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Burglary, kill FRANK BUDNICK, a human being, by stabbing the said FRANK BUDNICK with a knife, in violation of Florida Statute 782.04, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

'78 DEC -4 PM 3 43
CLERK CIRCUIT & COUNTY CTS.
DADE COUNTY, FLA.
03
FOR RECORD

COUNT II

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of November, 1978, within the County of Dade, State of Florida, McARTHUR BREEDLOVE, also known as, McARTHUR JENKINS, did unlawfully and feloniously

attempt to commit a felony, to-wit: Murder in the First Degree, upon CAROL MEONI, and in furtherance thereof, the defendant, McARTHUR BREEDLOVE, with felonious intent and from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in an attempt to perpetrate Burglary, did attempt to kill CAROL MEONI, a human being and in such attempt did stab the said CAROL MEONI with a knife, in violation of 782.04(1) and 777.04(1), Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT III

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of November, 1978, within the County of Dade, State of Florida, McARTHUR BREEDLOVE, also known as, McARTHUR JENKINS, did, unlawfully enter or remain in a structure, to-wit: a dwelling, located at 1315 Northeast 146th Street, Dade County, Florida, the same being occupied by FRANK BUDNICK and CAROL MEONI, the property of CAROL MEONI, as owner or custodian, the defendant having an intent to commit an offense therein, to-wit: Theft, and in the course of committing said Burglary, the defendant was armed or did arm himself with a dangerous weapon, to-wit: a knife, and made an assault upon FRANK BUDNICK and CAROL MEONI, by stabbing the said FRANK BUDNICK and CAROL MEONI with a knife, in violation of 810.02, Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT IV

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of November, 1978, within the County of Dade, State of Florida, McARTHUR BREEDLOVE, also known as, McARTHUR JENKINS, did, knowingly, unlawfully and feloniously obtain or use, or did endeavor to obtain or to use watches, earrings, and CASH, good and lawful money of the United States of America, value of ONE HUNDRED DOLLARS ($100.00) or more, the property of CAROL MEONI, as owner or custodian, with the intent to permanently deprive the said CAROL MEONI of a right to the said property or a benefit therefrom or to appropriate the same to his own use or to the use of a person not entitled thereto, in violation of 812.014, Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

COUNT V

The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Dade, upon their oaths, present that on the 6th day of November, 1978, within the County of Dade, State of Florida, McARTHUR BREEDLOVE, also known as, McARTHUR JENKINS, did, knowingly, unlawfully and feloniously obtain or use, or did endeavor to obtain or to use a Bicycle, value of less than ONE HUNDRED DOLLARS ($100.00), the property of DEBBIE LAYTON, as owner or custodian, with the intent to permanently deprive the said DEBBIE LAYTON of a right to the said property or a benefit therefrom or to

appropriate the same to his own use or to the use of a person not entitled thereto, in violation of 812.014, Florida Statutes, to the evil example of all others in like cases offending and against the peace and dignity of the State of Florida.

REV. RICHARD J. SOULLIERE
FOREMAN OF THE GRAND JURY

Case No. 286103-Y
Investigation into the Homicide of FRANK BUNDICK, W/M 23 years, which occurred at 1315 N.E. 146th Street, on November 6, 1978, at approximately 2:30 A.M. The following statement was taken at the Dade County Public Safety Department Building, 1320 N.W. 14 Street, Miami, Dade County, Florida, on Tuesday, 21 November 1978, commencing at 3:02 P.M. and concluding at 3:16 P.M., in the presence of Detective C. Zatrepalek and Sergeant Egler, Homicide Section. Recorded and transcribed by Steno-Reporter and Notary Public, Linda Albury.

(Thereupon, MCARTHUR BREEDLOVE was duly sworn according to law.)

Q (By Detective Zatrepalek) For the record, state your full name and age.
A McArthur Breedlove, age thirty-one.
Q What is your home address?
A 1401 N.E. 154th Terrace.
Q How long have you lived there?
A Ever since my parents moved from Hallendale.
Q How long would that be?
A Let's see. A year and something.
Q Did you go to high school?
A Yes.
Q Do you read and write?
A Yes.
Q Are you presently under the influence of any drugs, narcotics, or anything else other than drinking coffee here with us?
A No.
Q Do you realize that you are being charged with First Degree Murder and Breaking and Entering? Do you realize that?
A Yes.
Q Before we go any further, let me explain your Constitutional Rights to you first. All I want you to do is read this first line for me.
A "Before you are asked any questions, you must understand your Rights."
Q "You have the right to remain silent. You need not talk to me or answer any questions if you do not wish to do so."
Do you understand that?
A Yes.
Q Are those your initials there?
A Yes. MB

Q "Should you talk to me, anything which you say can and will be introduced into evidence in court against you." Do you understand that?
A Yes.
Q Are those your initials after that?
A Yes.
Q "If you want an attorney to represent you at this time or at any time during questioning, you are entitled to such counsel."
Do you understand that?
A Yes.
Q Are those your initials there?
A Yes.
Q "If you cannot afford an attorney and so desire, one will be provided without charge."
Do you understand that?
A Yes.
Q Are those your initials?
A Yes.
Q "I have read the above statement of my Rights and am fully aware of the said Rights."
Do you understand that?
A Yes.
Q Are those your initials?
A Yes.
Q "I am willing to answer any questions asked of me."
Do you understand that?
A Yes.
Q Are those your initials?
A Yes.
Q "I do not desire the presence of an attorney at this time."
Do you understand that?
A Yes.
Q Are those your initials?
A Yes.
Q "This statement is signed of my own free will without any threats or promises having been made to me."
Do you understand that?
A Yes.
Q Are those your initials?
A Yes.
Q Is this your signature here?
A Yes.
Q The date is 11-21-78. The time is 11:55 A.M. That is the first time I started talking to you today?
A Right.
Q McArthur, calling your attention to Monday, the 6th of November in the early morning hours, let's say from 12:00 A.M. to 3:00 A.M., can you tell me where you were?
A I was-- what were the times?
Q Between the hours of 12:00 A.M. and 3:00 A.M., Monday, the 6th of November, can you tell me where you were at?

mb

A I was out.
Q What particular part of town?
A North Miami Beach.
Q Were you near N.E. 146th Street?
A Yes.
Q Did you do anything in that area?
A Yes.
Q What did you do?
A I broke in a house.
Q Do you know the address of that house?
A No.
Q Do you know approximately what avenue it is located on?
A 14th. Let's see. Between 16th and 14th.
Q Between what avenues?
A 16th Avenue and 14th Avenue.
Q In relations to a church in that neighborhood; are you familiar with the Holy Family Church?
A Yes.
Q Is it anywhere close to there?
A Yes.
Q How far away from that Church?
A I'd say about six, seven blocks.
Q Which direction?
A Going south.
Q The house that you broke into, can you describe it to me?
A I can't describe the house. You're talking about the inside?
Q How many bedrooms?
A Two bedrooms.
Q How many bathrooms?
A One. mb
Q What time did you go inside that house?
A About 1:30, 2:00 AM
Q How did you get inside?
A I walked in the back door.
Q Can you describe the back door to me?
A One back door didn't have no jalousies and the other one was a wooden door.
Q The one with no jalousies, was it locked?
A No.
Q Where did that lead to?
A To the other door.
Q What room were you in after you got inside the jalousie door? What room were you in?
A The utility room.
Q Now, the next door you came to, what kind of door was that?
A A wooden door.
Q Was that door locked?
A No. mb

Q You went inside the house through that door?
A Yes.
Q Which room did you go into?
A The bedroom.
Q Before you went into the bedroom, which room were you in?
A The living room.
Q When you entered through that door, what room did you go through?
A The kitchen.
Q When you got inside the kitchen, what did you do?
A Well, I walked through the kitchen.
Q Where did you go to?
A To the living room.
Q What happened once you got into the living room?
A I picked up the purse.
Q What kind of purse?
A Lady's purse.
Q Do you remember what color it was?
A No.
Q Do you remember where it was at in the living room?
A On the couch.
Q What did you do with it then?
A I took it back out and dumped it out.
Q Outside in the back or front?
A In the back.
Q Where did you dump it at?
A By the back porch.
Q Did you remove anything from the purse?
A Yes. Some money and a watch.
Q How much money?
A Give or take twelve, fifteen dollars.
Q What kind of watch was it?
A Block watch.
Q You mean a black watch? Are you referring--
A Block watch, square watch.
Q What color was the band?
A Gold.
Q Do you remember the brand name of the watch?
A No.
Q Did you noticed anything unusual about the watch?
A It had some stones like diamonds in it.
Q Where at?
A In the face of it.
Q Where did you leave the purse at?
A Outside.
Q Then what did you do?
A I went back in to look for more jewelry and money.

Q Where did you go?
A I went to the bedroom.
Q What bedroom?
A What bedroom?
Q Yes.
A The bedroom that the people were sleeping in.
Q Did you go in any other bedrooms in that house?
A No.
Q Where were the people sleeping at?
A In the front of the house.
Q Do you know what kind of bed they were sleeping in?
A No.
Q What happened when you entered the bedroom?
A Well, I started going through a box--a jewelry box, the dresser drawers, and I made some noise, and the guy woke up and grabbed my by the shirt, and I swung back with the knife, and I ran.
Q Backing up for the second. Where did you get the knife?
A I got the knife in the living room as I come out of the kitchen on the table.
Q What kind of knife was it?
A Kitchen knife.
Q How big was it?
A About twelve inches.
Q How wide was it?
A I'd say an inch.
Q What color was the handle?
A I think it was brown.
Q So, you had the knife when you went inside the bedroom?
A Yes.
Q When you were going through the jewelry box, how were you going through it?
A With the knife, trying to break it open to gain entry into it.
Q Did you get it open?
A No, because when I popped it, the guy woke up.
Q Was there anybody else in the bedroom?
A There was a lady there.
Q Do you remember what side of the bed the man was sleeping on?
A He was sleeping on the side where the dresser was, towards me.
Q Was he on the side closest to the door or farthest away from the door?
A Closest to the door.
Q When he jumped up, did he say anything to you?
A "What the hell are you doing in here." Something like that.

MB

Q What did you say?
A I jumped, panicked. He just grabbed my shirt. I swung back with the knife, like that, and then he turned loose of my shirt and I ran.
Q When you swung back with the knife, was there any struggling or anything like that going on?
A He was just holding me trying to get closer.
Q How many times did you swing with the knife?
A Once.
Q Do you recall if you struck or hit the lady with the knife or not?
A No.
Q You don't recall?
A No, I don't recall hitting her with the knife.
Q What did you do with the knife?
A I dropped it. I assume I dropped it.
Q What was the next thing that you did?
A As I was running out, I picked up the pants, and then I thought I had gone through the pants, and I dropped them and kept on running out the back door.
Q Where did you drop the pants?
A In the hallway, I think.
Q After you went out the back door, where did you go?
A Well, I ran to where I saw this bike.
Q Where was that?
A Down the street.
Q How far?
A About three houses.
Q Did you get the bike?
A Yes.
Q What kind of bike was it?
A Ten-speed.
Q What color?
A Blue.
Q Was there anything unusual about that bike?
A It was just painted, you know, rough painting.
Q Did it have all the equipment on it?
A No. It was a stripped down ten-speed.
Q Where did you go then?
A I went up to U-Totem.
Q Did you eventually go home?
A Yes.
Q What time did you get home? MB
A Around 2:30, something to 3:00. AM
Q Did you take the bike home?
A Yes.
Q Where did you park it?
A I parked it in the yard. Everybody rode it until it got a flat tire.
Q Backing up; when you were inside the people's bedroom, did you hear the lady say anything?
A No. I was, you know-- It wasn't real dark, but you just could see.
Q Did you go into any other part of the house?
A I don't remember, no.
Q What were you wearing that night?
A I was wearing blue and black checkered pants.
Q Where are the pants that you had on that night?

A They are in the garbage pin.
Q In the garbage pin. Where is the shirt?
A Inside the house.
Q What kind of shirt was it?
A Blue and white shirt.
Q What shoes were you wearing?
A Wearing these shoes here.
Q The house that you went into-- Are you familiar with the directions east and west from where you are living or north and south?
A Yes.
Q From your house, where would it be?
A Going south.
Q Do you know what street that is?
A You said 146th.
Q Were you familiar with that before I said 146th?
A Not the street, but I know the area.
Q Where is the watch at now?
A I sold it up in Hallendale to a junkie.
Q Do you know his name?
A No, not right off.
Q Do you think we can find out who he is?
A No, because if the police go up there and start asking the dope feens, they are just going to clam up.
Q Has everything you have stated been the truth?
A Yes.
Q Has anyone threatened or coerced you to make this statement?
A No.

DETECTIVE ZATREPALEK: That's it.

(THEREUPON, the statement was concluded at 3:16 P.M.) mB

STATE OF FLORIDA)
COUNTY OF DADE) SS.

I, LINDA ALBURY, Notary Public duly commissioned and qualified in and for the State of Florida at Large, do hereby certify that said witness, MCARTHUR BREEDLOVE, was first duly sworn by me to tell the truth, the whole truth, and nothing but the truth prior to him giving testimony on Tuesday, 21 November 1978, at 3:02 P.M.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 21st day of November 1978, at Miami, Dade County, Florida.

Linda Albury
Notary Public, State of Flor
at Large

My Commission expires:

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLA.

CASE NO.: 78-17415

THE STATE OF FLORIDA)
Plainitiff)
vs)
MACARTHUR BREEDLOVE)
Defendant)

DEFENDANT'S REQUESTED
JURY INSTRUCTION # 2

The mitigating circumstances which you may consider are unlimited and you may consider any evidence presented at trial or the sentencing proceeding in mitigation of the defendant's sentence.

Proffitt v. Florida, 428 U.S. 242 (1976).

GRANTED: ____
DENIED: ✓

RICHARD FULLER, Judge
Circuit Court

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA IN AND FOR DADE COUNTY

CASE NO. 78-17415

THE STATE OF FLORIDA,

Plaintiff,

vs.

MacARTHUR BREEDLOVE,

Defendant.

DEFENDANT'S REQUESTED
INSTRUCTION #5

The aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitless crime which is unnecessarily tortuous to the victim.

GRANTED: ____

DENIED: ✓

RICHARD FULLER, Judge
Circuit Court

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLA.

CASE NO.: 78-17415

THE STATE OF FLORIDA)
Plaintiff)
vs)
MACARTHUR BREEDLOVE)
Defendant)

DEFENDANT'S REQUESTED
JURY INSTRUCTION # 11

You may consider any factor that has been presented to you as a mitigating circumstance. You are not limited to the mitigating circumstances that I have listed for you.

GRANTED: ✓

DENIED: _____

RICHARD FULLER, Judge
Circuit Court

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLA.

CASE NO.: 78-17415

THE STATE OF FLORIDA)
Plaintiff)
vs)
MACARTHUR BREEDLOVE)
Defendant)

DEFENDANT'S REQUESTED
JURY INSTRUCTION # 12

The mitigating circumstances which you may consider are unlimited and you may consider any evidence presented at trial or the sentencing proceeding in mitigation of the defendant's sentence.

Proffitt v. Florida, 428 U.S. 242 (1976).

GRANTED: /

DENIED: ____

RICHARD FULLER, Judge
Circuit Court

AGGRAVATING

1) The crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

(2) At the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use (threat) of violence to some person.

7. 3) The defendant, in committing the crime for which he is to be sentenced, knowingly created a risk of death to many persons.

(4) The crime for which the defendant is to be sentenced was committed while the defendant was engaged (was an accomplice) in the commission of (an attempt to commit) (flight after committing or attempting to commit) any robbery, arson, ~~burglary,~~ kidnaping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(5) The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(6) The crime for which the defendant is to be sentenced was committed for pecuniary gain.

7) The crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

HASE

MITIGATING

1) The defendant has no significant history of prior criminal activity.

2) The crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3) The victim was a participant in the defendant's conduct or consented to the act.

4) The defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.

5) The defendant acted under extreme duress or under the substantial domination of another person.

6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7) Age of the defendant at the time of the crime.

Supreme Court of the United States

No. A-4

McARTHUR BREEDLOVE,

Petitioner

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(~~s~~),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 17, 1982

L. F. P., Jr. (DSK)

Associate Justice of the Supreme Court of the United States

Dated this 6

day of July, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

RECEIVED
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SUPREME COURT, U.S.

McARTHUR BREEDLOVE,

Petitioner,

vs,

THE STATE OF FLORIDA,

Respondent.

A 4

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE LEWIS F. POWELL, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Petitioner, McArthur Breedlove, by and through undersigned counsel, prays that an order be entered, pursuant to Rule 20.1 of the Rules of the Court, extending the time for filing a petition for writ of certiorari by 30 days, to and including August 17, 1982. In accordance with Rule 29.2 of the Rules of the Court, this application is filed 10 days prior to the date upon which the petition is now due. In support of this application, petitioner would state:

1. Petitioner was sentenced to death on May 2, 1979 for the offense of first-degree murder in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County. The judgment petitioner seeks to have reviewed was entered by the Supreme Court of Florida on March 4, 1982 and rendered upon the denial of a timely motion for rehearing on May 19, 1982. A copy of the decision is appended hereto.

2. Petitioner intends to file in this Court a petition for writ of certiorari to review the judgment of the Supreme Court

of Florida in this cause. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted in the state courts a deprivation of rights secured by the Constitution of the United States.

3. The federal questions to be presented are: 1) that the introduction of out-of-court statements of available witnesses by the prosecution at the trial of petitioner, and the reliance by the prosecution upon those statements violated the Confrontation Clause of the Sixth Amendment to the Constitution of the United States; and 2) that Section 92.141(5)(h), Florida Statutes (1977), establishing a potential aggravating circumstance in a capital case that a homicide was "especially heinous, atrocious, or cruel", was applied in an unrestricted and overbroad manner by the trial court and the Supreme Court of Florida, in violation of the Eighth and Fourteenth Amendments to the constitution of the United States.

4. Pursuant to Rule 20.1 of the Rules of the Court, the petition for writ of certiorari in this cause is due to be filed in this Court on July 18, 1982. No previous extensions have been requested.

5. Petitioner requires additional time within which to file his petition for writ of certiorari for the following reasons:

a. The issues to be presented to this Court are important and complex.

b. Undersigned counsel is currently responsible for the representation of approximately 70 clients in state and federal courts, including another death-sentenced defendant whose case is presently pending in state post-conviction proceedings, which have required the attention of undersigned counsel for a significant period of time during the past several months.

c. Preparation of the petition in this cause was commenced as soon as was possible, in light of the other responsibilities of undersigned counsel, in an effort to timely file the petition; however, it has proved impossible to complete

the petition within the time allotted by Rule 20.1

6. In view of the foregoing factors, petitioner cannot adequately prepare and file his petition by July 18, 1982. This application is made in good faith and not for dilatory purposes.

WHEREFORE, petitioner respectfully requests an order extending for 30 days, until August 17, 1982, the time within which to file his petition for writ of certiorari to the Supreme Court of Florida in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3005

By: ELLIOT H. SCHERKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Application for Extension of Time in Which to File Petition for Writ of Certiorari has been served upon JIM SMITH, Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, counsel for respondent, by depositing same in the United States mail, first class mail, postage prepaid, this 1st day of July, 1982, and that all parties required to be served have been served this date.

ELLIOT H. SCHERKER

Supreme Court of Florida

No. 56,811

McARTHUR BREEDLOVE,
a/k/a McARTHUR JENKINS, Appellant,

v.

STATE OF FLORIDA, Appellee.

[March 4, 1982]

PER CURIAM.

McArthur Breedlove appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and affirm the results of his trial.

A five-count indictment charged Breedlove with first-degree murder, attempted first-degree murder, burglary, grand theft, and petit theft. The charges stemmed from the stabbing death of one victim and the wounding of another which occurred during the burglary of their dwelling. The jury acquitted Breedlove of attempted murder, but convicted him of the other charges. Concurring in the jury's recommendation, the trial court imposed the death sentence for the murder conviction. The court also imposed consecutive sentences of life imprisonment for burglary, five years for grand theft, and sixty days for petit theft.

Breedlove presents six points on appeal: 1) Brady[2] violation; 2) denial of motion to suppress; 3) improper admission of hearsay; 4) improper remarks by prosecutor during closing

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[1] Art. V, § 3(b)(1), Fla. Const.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

argument: 5) conviction and sentence for burglary violate double jeopardy clause; and 6) impropriety of death sentence.

In four motions defense counsel requested the production of police reports made by six police officers and detectives and of field investigation cards filed on "suspicious" persons. The trial court denied all four motions without recorded comment. The requested material, along with other unrequested reports, was deposited with the judge who examined it in camera and ordered portions of the material released to defense counsel. All formal statements of persons connected with the case were also furnished to the defense.

On appeal Breedlove claims that the State violated the admonition of Brady v. Maryland, 373 U.S. 83, 87 (1963), that

> suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution.

In making this claim, Breedlove relies on unfurnished portions of a Detective McElveen's report.[3] This report reflects the substance of a conversation that McElveen had with Breedlove's mother, Mary Gibson, and his brother, Elisha Gibson, to the effect that the mother had not seen several items stolen from the victims' residence in Breedlove's possession and that Breedlove had returned home around 2:30 a.m. (the approximate time of the murder) and had left again between 4:00 and 4:30 a.m. This report also states that both the mother and brother referred to blood on Breedlove's clothes and that the brother described items, later established to have been taken from the victims' residence, which he saw in Breedlove's possession on his return home at approximately 2:30 a.m.

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[3] After his in camera inspection, the trial judge sealed the police reports. Breedlove's appellate counsel had access to the sealed reports after trial to assist in preparing this appeal. Only McElveen's report is specifically referred to on appeal, and inspection of the reports reveals McElveen's report to be the only one containing possibly favorable information which the defense might not have received in some fashion.

Breedlove's argument on this point, however, ignores, except for one accord reference, United States v. Agurs, 427 U.S. 97 (1976). In Agurs, the Supreme Court identified three discovery situations: 1) undisclosed evidence demonstrates the prosecutions's use of perjured testimony; 2) a pretrial request for specific evidence ("Brady"); and 3) a general request for "Brady material" (Agurs). McElveen's report falls within the third category, and Agurs is controlling on this point.

The state provided two lists of witnesses in which the names of sixteen law enforcement persons appear. These include officers, detectives, technicians, and a stenographer. Although McElveen's name is on the first list, he was not included in the motions for production which specified the reports of six officers and detectives by name. The record reflects no formal request for all "Brady material," but we believe that McElveen's report, as well as those of the other unspecified law enforcement personnel, is within Agurs' third situation.

Brady's broad holding has been limited somewhat by Agurs:

> [T]o reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.

427 U.S. at 108. Furthermore, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 109-10. In response to claims very similar to Breedlove's, this Court recently stated that "[d]isclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation." Perry v. State, 395 So.2d 170, 174 (Fla. 1980). The record shows that the trial court carefully observed Breedlove's discovery rights. Breedlove has failed to demonstrate that the material contained in McElveen's report could not have been found through reasonably

diligent preparation or that nonproduction of this report prejudiced him.

Breedlove also claims that the police reports are discoverable per se as "statements." Florida Rule of Criminal Procedure 3.220 covers statements which are discoverable and defines a "statement" as

> a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement. . . .

Fla. R. Crim. P. 3.220(a)(1) (i).. The courts of this state have generally held that police reports are not "statements," except of the officers making them, and that generally they are not discoverable per se as statements of those officers. See State v. Johnson, 284 So.2d 198 (Fla. 1973); Lockhart v. State, 384 So.2d 289 (Fla. 4th DCA 1980); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980); Dumas v. State, 363 So.2d 568 (Fla. 3d DCA 1978), cert. denied, 372 So.2d 471 (Fla. 1979); Pitts v. State, 362 So.2d 147 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 1372 (Fla. 1979); Miller v. State, 360 So.2d 46 (Fla. 2d DCA 1978); State v. Lattimore, 284 So.2d 423 (Fla. 3d DCA 1973), cert. denied, 291 So.2d 7 (Fla. 1974); State v. Gillespie,[4] 227 So.2d 550 (Fla. 2d DCA 1969). The material in the instant reports does not comprise "statements" because the reports have not been signed, adopted, or approved by the persons (other than the officers) to whom they have been attributed, they do not appear to be substantially verbatim, and they were not recorded contemporaneously with their making. We do not find that these reports are discoverable as "statements" as set out in rule 3.220.

The motions to suppress filed by Breedlove's attorneys sought exclusion of any statements by Breedlove, of evidence

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[4] Gillespie contains an analysis of what is and is not Brady material.

found at his mother's home, and of evidence found on his person. On appeal Breedlove only alleges error regarding admission of his statement of November 21, 1978. In that statement Breedlove admitted breaking into a dwelling, taking numerous items, stabbing a man, who had been asleep in a bedroom, with a butcher knife that Breedlove had taken off a table in the living room, and stealing a bicycle to make his getaway. Breedlove alleges that the police violated his fifth amendment rights in obtaining that statement.

Upon learning that Breedlove was in custody, a Detective Nagle of the Hallandale Police Department requested permission to interview him concerning a murder that had occurred in Hallandale several years earlier. Detective Zatrepalek of the North Miami Beach Police Department, lead officer on Breedlove's case, had Breedlove brought over from the county jail. Robert Shultz, a counselor at the jail, escorted Breedlove downstairs and turned him over to two officers.

At the suppression hearing, Shultz testified that Breedlove had said something like "They had better be the people I want to talk to" or "I don't want to talk to certain detectives." He also stated that, on seeing the officers, Breedlove said, "I am not talking to them," and the officers "said something to the effect that 'Eventually you will talk to us.'" On appeal Breedlove claims that these statements show that he tried to exercise his right to remain silent and that his subsequent statement is invalid because the police did not "scrupulously honor" (Michigan v. Moseley, 423 U.S. 96, 104 (1975)) his refusal to talk to them.[3]

Shultz also testified that it was his duty to report any improper police behavior but that he had not observed any improper behavior regarding Breedlove. Shultz had known Breedlove since his incarceration and testified that he had never noticed

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[3] Appellant's brief states that Breedlove's public defenders had visited him in jail prior to the 21st and that he had agreed not to speak to police without counsel present.

signs of Breedlove's being physically abused and that Breedlove had never complained to him about being abused. Shultz also said that prisoners could refuse to leave their cells in order to avoid being interrogated, but that Breedlove had never done so.

After arriving at the station, Detective Latrepalek read Breedlove his Miranda rights and Breedlove signed the rights form. Breedlove then asked to speak with his mother and was not questioned during the hour or so before she arrived. He spoke with her in private and then asked her to tell Latrepalek that he would make a statement. After speaking with the detectives, Breedlove was again read his rights, signed another card, and made a formal statement. Latrepalek testified that he had never beaten Breedlove and that, when interviewed by Detective Hagle on the following day, Breedlove asked Latrepalek to stay with him.

Breedlove, on the other hand, testified that Detectives Latrepalek and Ojeda had beaten him on November 9, that he refused to go with the officers on the 21st, and after being threatened on the 21st he confessed in order to avoid another beating.[6] The judge found that Breedlove understood his rights on both the 9th and 21st of November and that he freely and voluntarily waived those rights.

Breedlove now claims that the statement, "eventually you will talk to us," was an implied threat constituting coercion and tainting the ensuing statement so that no proper waiver occurred. From the totality of the circumstances, it does not appear that the statement was coerced. Rather, Breedlove chose not to exercise his right to remain silent or to have counsel present, making the damaging statement after talking with his mother. The judge properly concluded that he freely and voluntarily made the statement.

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[6] Breedlove's original public defender, David Finger, testified that, although Breedlove told him prior to the 21st that he had been beaten, Finger saw no evidence of physical abuse, never reported Breedlove's statements regarding the beating and later coercion on the 21st, and never investigated Breedlove's claims.

At trial Detectives Ojeda and Katrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them, both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor the brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause.

Hearsay is an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement. Leonardi v. Flamingo Fountain, Inc., 337 So.2d 19 Fla. 3d DCA 1976).[7] Hearsay is inadmissible for three reasons: 1) the declarant does not testify under oath; 2) the trier of fact cannot observe the declarant's demeanor; and 3) the declarant is not subject to cross-examination. State v. Freber, 366 So.2d 426 (Fla. 1978). "The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." Dutton v. Evans, 400 U.S. 74, 88 (1970). In Dutton the Court went on to say that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' California v. Green, 399 U.S. at 161." 400 U.S. at 89. On the other hand, "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." Anderson v. United States, 417 U.S. 211, 219 (1974). Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose. Hunt v. Seaboard Coast Line Railroad Co., 327 So.2d 193 (Fla. 1976); Williams v. State, 338 So.2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is not directed to the

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[7] We note that ch. 81-93, Laws of Fla., slightly modified the definition of hearsay as set out in § 90.801(2)(c), Fla. Stat. (1981).

truth of the words spoken, but, rather, to whether they were in fact spoken. Id.

In the examination of Detective Ojeda the court sustained defense counsel's objection to his relating what Breedlove's mother said at her residence. Ojeda went on to testify that in talking with Breedlove on the 21st he told Breedlove what his brother had said about the bicycle. The court overruled the defense objection to this, stating that "it is not being offered for the truth of what was said." Other comments made by the mother and brother came in the same way; objections were overruled or sustained as needed. A side bar conference on hearsay was held, following which the judge gave the jury a cautionary instruction on Ojeda's testimony. Prior to cross-examination another side bar conference was held, wherein the defense said it would go into the Gibsons' statements because they had been received for an impermissible purpose. The court cautioned that defense would have to live with what this approach elicited. A similar course of events occurred during Detective Estrepalen's testimony.

In closing argument, defense counsel brought up the Gibsons' comments and wondered why they had not been called to testify. The state also brought up these comments, referred to their sworn statements (not introduced at trial), said that they told the truth in those statements, and then tied their formal statements to the detectives' testimony.

Defense counsel used these statements by the prosecutor to move for a mistrial because of "putting the truth of Elijah and Mary Gibson's statements in issue," and also asked that the jury be told to disregard the detectives' testimony regarding what the Gibsons had said or else be given another cautionary instruction. Defense counsel also asked that the jury be told to disregard the state's closing argument. The court found the state's argument proper and refused to reinstruct, referring to his earlier cautionary instruction. Defense again referred to the mother and brother in its final argument.

The court properly admitted the detectives' testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury on how to use this testimony.

In their last motion for a new trial defense counsel cited the prosecutor's argument, alleging prejudicial error. The court denied the motion. A mistrial should be declared for prejudicial error which will vitiate the trial's result. Perry v. State, 146 Fla. 187, 200 So. 811 (1941). If the alleged error ties to substantial harm and causes no material prejudice, a mistrial should not be declared. Id. Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing.

The judge refused to renew his cautionary instruction regarding the use of testimony referring to the Gibsons' statements and included no such instruction in those given before the jury retired to deliberate. The questions, therefore, are whether the prosecutor's comments transformed the nonhearsay material into hearsay and whether those comments were so prejudicial that this Court cannot say beyond a reasonable doubt that they had no effect on the verdict. Chapman v. California, 386 U.S. 18 (1967).

It appears that the prosecutor's remarks were improper. These remarks, however, were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements. On rebuttal defense counsel mentioned the stolen bicycle being found at the Gibson home. He went on to say that the bicycle

> could have been ridden by the other four adults in that house, and what about those people? What did they do? They pointed the finger at my client.
>
> Sure it is his mother and brother. I do not like mothers and brothers testifying like that against my client. They said, 'He did it. He is the one.'

Mr. Sedwin would have you believe we can call people like that.

(Emphasis added.) It appears that defense counsel admitted that those statements were true. Considering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial.[8]

On appeal Breedlove alleges that the prosecutor made improper arguments to the jury, thereby violating Breedlove's right to a fair trial. Besides use of the Wilsons' statements, he points to three other prejudicial or inflammatory remarks: 1) allegations of other criminal acts (rape);[9] 2) "derogatory" characterization (referring to Breedlove as an animal);[10] 3) appeal to community prejudice (violence in Dade County).[11]

Wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962), cert. denied, 372 U.S. 904 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer.

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8 In denying the motion for new trial the judge responded to defense's objection to the state's entire argument by saying: "I think the context in which the argument was made was not prejudicial in nature."

9 Breedlove charges that the state implied that Breedlove wanted to rape the woman in the house he was burglarizing. In going through what had happened, the prosecutor said that because of the purse Breedlove knew that a woman lived there. This is a permissible inference. His next comment, however, is not supported by the evidence: "He went prowling through the house to find that woman." Although Breedlove was a convicted mentally disordered sex offender (California), evidence concerning his past record and tendencies was not presented to the jury until the sentencing phase.

10 The prosecutor characterized the killing as a "savage and brutal and vicious and animalistic attack;" he did not refer to Breedlove as an "animal."

11 The prosecutor said: "When we walk the streets we take our chances." In response to an objection the court said: "Stay on the evidence in this case." The prosecutor then said: "One place in the world where we ought to be free from this kind of violence, this kind of crime, is in our own home." The court overruled an objection to this remark. These comments appear to reflect common knowledge and are probably the sentiments of a large number of people. They do not appear to be out of place.

The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas Parramore v. State, 229 So.2d 855 (Fla. 1969), modified, 408 U.S. 935 (1972). A new trial should be granted when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 934 (1977). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained-of remarks. Id. Compare Parramore with Wilson v. State, 294 So.2d 327 (Fla. 1974).

The judge refused to grant a mistrial, finding the state's argument not prejudicial due to the context in which the objected-to remarks were made. Some of the remarks may have been improper, but we do not find them so prejudicial that a new trial is required.

Breedlove was convicted of both first-degree murder and burglary and received the death penalty for the former and a consecutive life sentence for the latter. On appeal he claims that Pinder v. State, 375 So.2d 836 (Fla. 1979), mandates that the burglary conviction and sentence be vacated because the state proved only felony murder, not premeditated murder. The state, on the other hand, claims that it presented sufficient evidence of premeditation to warrant both convictions and sentences and also that Pinder should be rejected because of Whalen v. United States, 445 U.S. 684 (1980). Breedlove's Pinder claim and the state's Whalen argument have been disposed of in State v. Kegstrom, 491 So.2d 1343 (Fla. 1986). We find, however, that Breedlove's contention is not really an issue in this case because the state introduced sufficient evidence of premeditation.[12] See Kegstrom. Because we find that the jury need

[12] This evidence includes, among other things, Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims.

not have convicted Breedlove of burglary in order to support the murder conviction, we affirm the convictions and sentences for both first-degree murder and burglary.

As his final point, Breedlove makes several attacks on the death sentence: simple felony murder as a basis for the death penalty violates the eighth and fourteenth amendments; improper aggravating circumstances; limited consideration of mitigating circumstances; and death penalty disproportionate in this case.

Breedlove claims that death is an excessive punishment for a simple felony murder, based on Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978). Both the United States Supreme Court[13] and this Court[14] have found that the death penalty is not per se violative of either the federal or state constitution. Breedlove has presented nothing which would compel a different conclusion.

Breedlove states that "this Court has uniformly reversed death sentences in pure felony-murder cases, absent such a finding of an intent to kill" and cites numerous cases in support of this contention. While most of these cases deal with felony murder, all but one[15] concern jury overrides. They are not applicable to the instant case and do not support the point that Breedlove tries to make.

The court found three circumstances in aggravation:[16] previous conviction of violent felony; homicide committed during a burglary; and heinous, atrocious, and cruel. Breedlove argues that an underlying felony cannot be used in aggravation, but presents nothing which compels declaring the felony-murder aggravating circumstance unconstitutional. The trial court properly found the murder to be heinous, atrocious, and cruel. Although

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13 Gregg v. Georgia, 428 U.S. 153 (1976).

14 State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

15 Menendez v. State, 368 So.2d 1278 (Fla. 1979), was remanded for resentencing because of improper consideration of aggravating circumstances.

16 No mitigating circumstances found.

death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place.

Breedlove also claims that the prosecutor improperly argued three nonstatutory aggravating factors to the jury: that the jury would make a recommendation only ("passing the buck"; that Breedlove would be eligible for parole; and that Breedlove showed no remorse. While these remarks may have stretched the bounds of proper argument, Breedlove does not appear to have been prejudiced because the court did not find them in aggravation. Cf. Menendez v. State, 368 So.2d 1278 (Fla. 1979) (improper aggravating circumstances found); Riley v. State, 366 So.2d 19 (Fla. 1978) (same).

Breedlove also complains that the court limited the range of mitigating circumstances allowed to be considered and that the instructions gave inadequate guidance for consideration and weighing of these circumstances. The instructions, however, were proper and adequate, and the court did not limit presentation of mitigating evidence.[17] Breedlove now claims that the court erred in failing to find the lack of intent to cause death and impaired mental capacity. Finding felony murder in aggravation was proper, and, after acknowledging the conflicting testimony regarding Breedlove's mental capacity, the court chose to find his capacity not impaired or diminished. In the sentencing order the court stated:

> [T]his Court, after weighing and considering the aggravating and mitigating circumstances, is of the opinion that no mitigating circumstances, either statutory, or by any

[17] Defense's presentation consisted of witnesses who testified about Breedlove's mental and emotional problems.

testimony, facts or circumstances presented at the advisory proceeding, exist which outweigh the aggravating circumstances.

In the light of properly found aggravating circumstances, with nothing found in mitigation, imposition of the death penalty was proper.

We therefore affirm Breedlove's convictions and sentences.

It is so ordered.

ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
SUNDBERG, C.J., Dissents: "Because I believe that the truth of the statements attributed to Elijah and Mary Gibson were put in issue by the prosecution such testimony by the state's witnesses constituted prejudicial hearsay. Hence, I am compelled to reverse the conviction and remand for a new trial."

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 82-5188

McARTHUR BREEDLOVE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

RECEIVED
AUG 7 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, McArthur Breedlove, by and through undersigned counsel, moves this Court for leave to proceed in forma pauperis in the above-styled cause, pursuant to Rule 46.1 of this Court. Petitioner has been adjudicated indigent and permitted to proceed in forma pauperis by the courts of the State of Florida. The affidavit of the petitioner in support of this motion is attached hereto.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 N.W. 12th Street
Miami, Florida 33125
(305) 545-3005

By: Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, McARTHUR BREEDLOVE, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the costs of prosecuting the cause are true.

I am not presently employed and have not been employed for three years preceding the execution of this affidavit.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources. I do not own any cash or checking or savings account.

I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

McArthur Breedlove

McARTHUR BREEDLOVE

Sworn to and subscribed before me
this 29 day of June, 1982.

J W Warren

NOTARY PUBLIC
State of Florida at Large

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982